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No. 82-429

IN THE

Supreme Court of the United States

October Term, 1982

Jeannine Honicker,
Petitioner,

v.

United States of America,
Nunzio Palladino, John Ahearne,
Victor Gilinsky, Thomas Roberts,
and Peter Bradford, Commissioners,
United States Nuclear Regulatory Commission,
and
United States Nuclear Regulatory Commission,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Question Presented.

Whether the activities of the United States in fostering and regulating the production of nuclear energy, by causing planned, non-accidental deaths to citizens, foreign nationals, and unconsenting future persons, and damage to the genetic inheritance from which all living beings must originate, violate either the petitioner's constitutional, natural and statutory rights or the obligations of the United States under international law.

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IN THE

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October Term, 1982

Jeannine Honicker,

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v.

United States of America, et al.,

Respondents.

Petition for a Writ of Certiorari

To the United States Court of Appeals

For the District of Columbia Circuit.

The petitioner, JEANNINE HONICKER, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 11, 1982.

Opinions Below.

The unreported judgment of the U.S. Court of Appeals for the District of Columbia Circuit appears as Appendix A hereto. The Court's denials of rehearing and rehearing *en banc* appear as Appendices B and C, respectively. The final order and opinion of the U.S. Nuclear Regulatory Commission, affirmed without opinion by the Court of Appeals, is published at 46 *Federal Register* 39573 (August 4, 1981), and appears as Appendix D hereto.

Jurisdiction.

Final judgment of the Court of Appeals was entered on May 11, 1982. Petition for rehearing and suggestion of rehearing *en banc* were denied on June 7, 1982, and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1). Jurisdiction is founded upon the Constitution of the United States, Article III, Section 2, and Amendments IV and V; and upon the inherent and traditional power of this Court to do justice.

Constitutional Provisions Involved.

The constitutional provisions involved are set out in relevant portion as Appendix E hereto. The provisions involved include: Article I, Section 8; Article II, Section 3; Article III, Section 2; Article IV, Sections 2 and 3; Article VI, Section 2; and Amendments IV, V, IX, X and XIV.

Treaties Involved.

The treaties of the United States involved are set out in relevant portion as Appendix F hereto. These include: The United Nations Universal Declaration of Human Rights; The United Nations International Covenant on Civil and Political Rights; The United Nations International Covenant on Economic, Social, and Cultural Rights; The United Nations Convention on the Prevention and Punishment of the Crime of Genocide; The Nuremberg Principles; The United Nations Convention on the Rights of a Child; and The Helsinki Agreement.

Statutes Involved.

The statutes involved are set out in relevant portion as Appendix G hereto. These statutes include 5 U.S.C.§702 and 42 U.S.C.§§2011 *et seq.*.

Statement of the Case.

This is an appeal by Jeannine Honicker, a citizen of Nashville, Tennessee, from an order by the United States Court of Appeals for the District of Columbia Circuit, affirming the final order of the Nuclear Regulatory Commission, denying her petition for emergency and remedial action. As set out in greater detail in the record of proceedings below, this case constitutes a challenge to the authority of the federal government to cause fatal cancer, genetic effects, and incompensible illnesses to the general population of the United States and other nations as an intended

consequence of normal, non-accidental operation of the nuclear fuel cycle.

On July 29, 1978, Mrs. Honicker filed with the Nuclear Regulatory Commission (herein NRC or Commission) a 152-page petition requesting immediate action to redress an alleged condition of peril into which she and other members of the general public had been placed by the radiation protection standards of the agency. To underscore the seriousness of the constitutional principles at stake, Mrs. Honicker requested that all federal licenses which could be expected to result in, and condone, *non-accidental* or *planned* deaths to members of the general public be suspended at once, and that unspecified, but "substantial" remedial action be commenced within 30 days of the filing of her petition. When the NRC failed to act within a reasonable time upon this request, the petitioner appeared before the U.S. District Court for the Middle District of Tennessee seeking a temporary restraining order and other injunctive relief. Following the district court's denial of immediate relief, petitioner applied to the Court of Appeals for the Sixth Circuit for extraordinary writs, and subsequently to Justice Potter Stewart for writ of injunction, on September 13, 1978. These applications were denied without prejudice.

At the direction of the District Court, appeal of the agency's denial of emergency relief was taken to the Court of Appeals for the District of Columbia Circuit and there relief was denied because the order of the NRC was not final for purposes of review under 28

U.S.C.§2342. *Honicker v. NRC*, 590 F.2d 1207, reh. denied (D.C. Cir.), cert.denied, 441 U.S. 906, 99 S.Ct.1995, 60 L.Ed.2d 374 (1979). Appeal was then taken to the Sixth Circuit of the decision of the District Court to dismiss the petitioner's complaint because of the adequacy of the remedy under 28 U.S.C.§2342. There relief was denied because primary jurisdiction under §2342 precluded judicial intervention prior to the agency's issuance of a final order. *Honicker v. Hendrie*, 465 F.Supp. 414, affirmed, 605 F.2d 556 (6th Cir.), cert.denied, 444 U.S. 1072, 100 S.Ct. 1015, 62 L.Ed.2d 753 (1980).

The Commission issued its final order on July 29, 1981, which was published in the August 4, 1981 *Federal Register* (Appendix D, *infra*). On August 17, 1981, petitioner applied to the Middle District of Tennessee for an emergency order to preserve innocent lives during constitutional review of the agency decision. This application was denied on August 27, 1981. On September 14, 1981, Mrs. Honicker petitioned for review by the Court of Appeals for the District of Columbia Circuit and on September 23rd again moved for extraordinary writ to preserve innocent lives. On review, petitioner was supported by *amici curiae* representing persons and groups in 29 nations. The Court denied the petitioner's motion for writ, dispensed with oral arguments, and on May 11, 1982, affirmed the judgment and order of the Commission, without opinion. It is from this order that Mrs. Honicker now appeals.

Reasons For Granting the Writ.

I. The Order and Judgment of the Court of Appeals Will Cause the Deaths of Thousands of Innocent Citizens and Millions of Persons As Yet Unborn.

At the time of the passage of the Atomic Energy Act of 1954, it was widely believed by both the Members of Congress who drafted the Act and by the general public that the use of atomic energy as a means of generating heat or electricity would have virtually no deleterious effects upon the health of the general population, except in the event of a serious accident involving a large scale release of either special nuclear material, fission products, or byproduct material.[1]

This early optimism found clear expression in the legislative history of the Atomic Energy Act:

> "Operation of atomic reactors, whether for power or for fissionable material production, involves some degree of hazard from radioactivity. One of the questions explored briefly during the hearings was how these hazards might be minimized and the practices of industry with regard to them regulated. . . . With the normal operation of any of the designs now in sight, the problem of the safety of the operators or the nearby people is entirely one of shielding, which is a straightforward engineering problem."[2]

> "It is now evident that greater private participation in [nuclear] power development need not bring with it attendant hazards to the health and safety of the American people."[3]

By 1954, nuclear reactors had been in use for a decade and were widely believed to be one of the most environmentally benign of all methods of power production. It was not until 1969, at a time when 65 of the 73 commercial reactors now operating had already been licensed, that ominous warnings about the effects of increased radiation exposure to the U.S. population began to emanate from Atomic Energy Commission(AEC) laboratories.[4]

In 1969, the AEC released the first, preliminary findings from its new program to comprehensively investigate "man-made environmental radioactivity and [its] effects upon plants, animals, and human beings."[5] These findings, issued by Lawrence Livermore Radiation Laboratory, cautioned that emissions from the fuel cycle considered "acceptable" under the Code of Federal Regulations could in fact kill large numbers of people. "If the average exposure of the U.S. population were to reach the allowable 0.17 rads per year on the average," the scientists warned, "there would in time be an excess of 32,000 cases of fatal cancer plus leukemia per year." These deaths, they emphasized, would continue to occur "year after year."[6]

As study followed study, the initial estimates not only were confirmed, but the numbers increased. As more came to be revealed about the effects of radiation experienced by atom-bomb survivors, uranium miners and early atomic workers, and as more was learned about many unsuspected pathways by which radiation was reaching the genetic material of the human population, the number of potential radiation victims expected to occur from normal operation of the nuclear

fuel cycle stretched into the millions.[7]

As health physics, microbiology, and human radioepidemiology developed, our early national optimism about the harmlessness of low-level radiation vanished. Repeated studies verified that radiation is a powerful bio-genetic poison, capable of causing irreversible health damage at the lowest measurable doses.[8]

Today it has become universally recognized that there is no proven threshold for potentially fatal injury from radiation—that there is no "safe" dose. It is now also widely recognized that all exposures to radiation are cumulative; both in individuals, and in the species as a whole. Indeed, studies have shown that exposure of parents increases the susceptibility of their offspring to cancer.[9] We are thus confronted with accumulating genetic susceptibility to an increasingly radioactive environment, a process which places the survival of the species itself in jeopardy.[10]

In the natural environment, our species has always been enveloped in radiation: from our sun and moon; from distant stars and cosmic winds; and from elements distributed in the soil, rocks, and oceans of the Earth. All human populations pass through life exposed to some part of this radioactive environment. It is now estimated that up to half of all new cancers are caused by this "background" radiation, which had previously been thought harmless, or even beneficial.[11] It is now thought that the small dose which we receive from natural background radiation is a significant factor in the normal aging process, the process of the bodies of living organisms whereby abnormal cells gradually

replace normal cells until a vital function is sufficiently impaired to result in death.[12]

Before life could begin upon the Earth, it took millions of years for our planet to quench the radiation from its surface and to erect atmospheric barriers to radioactive bombardment from space. Yet background radiation has continued to play a vital role in our billion-year process of evolution. By continual death and replacement, and by continual minor mutations over many eons, the human species, as well as all other lifeforms, have developed into what they are today.

Very early in this evolutionary process, primary emphasis had to be given to the protection of our genetic code through the development of extremely efficient and sophisticated chemical repair mechanisms. Only in this way could the advancements of evolution be protected against the deteriorating effect of ever-present natural radiation, and could the high stability of the human species over periods of millions of years be assured. For evolution to proceed, however, it was also necessary that a balance be struck between the ability of the human organism to repair itself and the need for continual death and replacement to evolve the species. This fine balance was made between the evolving human organism and the relatively constant natural background level of radiation over the course of millions of years, and is an extremely delicate one.[13]

Our acquisition of knowledge about the biological effects of ionizing radiation has been a slow and painful process. Recent advances in computerized epidemiology have permitted the identification of a fivefold-increase in lung cancer among uranium miners, an abnormal rate

of specific site cancers among atomic production workers, and significantly elevated rates of leukemia among both servicemen at nuclear weapons tests and children living downwind of the Nevada Test Site, all of whom were protected by stringent federal regulations at the time of their exposures.[14]

Yet, to say that we may attribute cancer and birth defects to radiation as an entire population is not to say that individual victims can as yet attribute exposure to radiation to be the cause of their particular injury. Radiation has been likened to tiny, imperceptible bullets, which randomly strike the cells of the body and through several physical processes cause breaks in the structure of our DNA; our genetic code. Of course, a particular break does not, and probably never will, reveal its causation. Since we live in a constant barrage of radiation, natural and unnatural in origin, we as individuals can never know for certain whether a cancer, birth defect, or any genetically inspired injury was a product of nature, or of human design. There is, by the nature of the physical process, no means of providing legal redress for the victims of man-made radiation in the overwhelming majority of cases. If due process of law is ever to be provided to these victims, it may only be provided at the time the damage *is* attributable—at the source, at the time of release, by mathematical, epidemiological projection.[15]

In order to reap the benefits of nuclear energy we have told ourselves that the health consequences of radioactive releases will be obscured by time and distance, by the inability to show causation, or by a perpetual scientific controversy concerning the

quantum of effect. Tragically, by this lapse of foresight, we have enabled enormous damage to be done to the public health; and more ominously, to the genetic inheritance from which all health derives, and will derive in future generations.[16]

In the numerous publications cited in the Commission's order, the NRC staff has estimated in detail the number of cancers, birth defects, and other causes of premature death which are likely to result from the designed operation of the nuclear fuel cycle. Totaling these figures for the 190 nuclear reactors expected to be operating in the U.S. by the year 2000, and barring accidents, NRC would anticipate some 378,000 lethal cancers and 113,000 genetic effects to result over the long term during which the released isotopes will persist in the environment. The Commission has indicated that these figures could be low by a factor of 2, which would make the upper range estimate of the agency 756,000 lethal cancers and 226,000 genetic effects. All cancers (i.e.: double the number of lethal cancers) and birth defects could total 1,740,000 in the Commission's upperbound estimate, which it terms "acceptable."[17]

Because four out of every five of these deaths will be experienced by children who cannot possibly consent to sacrifice their lives for the benefit of nuclear electricity; because the class of victims will be predominately those of a particular genetic subgroup; and because those whose ancestors will suffer genetic damage from radiation will be those most susceptible to the effects of increased environmental radiation levels in the future—a downward-accelerating spiral of ruptured DNA molecules—this case is now presented to this Court.

The respondents have made a decision to conduct a historic experiment upon the genetic material from which all future humans must originate. They have done so without express direction from Congress or the President, without statutory or Constitutional authorization, without consent of those who must bear the consequences, and without adequate controls to prevent irreversible damage. Review of that decision by this Court is therefore urgently required.

II. The Majority of these Deaths Will Occur in Children who Will neither Enjoy the Benefits of the Federal Activity for which They Are To Be Sacrificed, nor Are Capable of Consent to that Sacrifice.

If one million American schoolchildren were selected at random and assembled in one place, one would expect to find a wide range of backgrounds, interests, and abilities. They would come from all walks of life, all races, all religions, and all ethnic subcultures. Some might be future Olympian gold-medalists. Some might one day walk the surface of distant planets, or devise the means for others to travel through space and return. One might hold the key to nuclear disarmament, or the cure for the common cold. There might be a future President of the United States, or a prospective Secretary-General of the United Nations.

If a federal commission ordered that these million children be lined up and shot, it would be an atrocity never before witnessed in America. If circumstances permitted, some of the childrens' parents would rush for a court order to stay the execution. After all, these children would have been singled out—

"particularized"—and their planned execution would be immediate unless prevented.

By publication in the *Federal Register* on August 4, 1981,[18] a federal Commission ordered the deaths of more than one million American schoolchildren. Their deaths were felt necessary in order to render nuclear energy economically competitive with its principal alternatives for the generation of electricity. The cost in megadeaths in exchange for the benefits in megawatts was deemed to be in the best interests of the nation on the long term.[19]

This is not to say that these deaths were essential in order to continue the immediate supply of electricity. On the contrary, these deaths were ordered at a time when one electrical generating station in three was sitting idle at peak-use hours because of a national overcapacity in electricity.[20] Moreover, even with the sacrifice, and even with continuing multi-billion-dollar annual federal subsidies,[21] nuclear power remained ten times more expensive[22] than competing, but federally neglected, investments to improve electrical supply.[23]

The petitioner, who is a parent and grandparent of some of the potential victims, brought suit to enjoin the needless slaughter of these innocent children, and to preserve her own inalienable rights. The Commission denied relief under the Atomic Energy Act, arguing that the Act could not be used to halt "the very industry which it was intended to bring into being."[24]

As to the constitutional claims, the Commission argued:

> "The Supreme Court appears to have stressed that for the Fifth and Fourteenth Amendments

> to apply, the threat to life must be borne by particular ascertainable individuals rather than the public at large."[25]

The Commission further argued, in briefs before the Court of Appeals, that any distinction between accidental, and frequently compensable, injury to members of the general public—a necessary and unavoidable concomitant of any large-scale governmental or industrial activity—and the planned, non-accidental, virtually incompensable—yet entirely avoidable—deaths of a million innocent children, is "inherently implausible" or "pragmatically irrelevant."[26]

Said the Commission:

> "The benefit provided by nuclear power, generation of electricity, is clearly of great value to society. Although the program is not free of hazards, the risks to any individual are slight. The number of deaths estimated to result from the nuclear power program is extremely small compared to the number of persons benefited, and it may be expected that all reasonable means to reduce the health impacts still further will be taken as they are discovered."[27]

With that order, the children were sent to their deaths, not with a bang but with a whimper. Not in a hail of bullets or herded into gas chambers, but bleeding the entire volume of blood from their tiny bodies in the last stages of leukemia, or convulsed in the agonizing pain of terminal cancer. On May 11, 1982, the Court of Appeals summarily affirmed the order of execution, and ordered further that that affirmance not be published in the public record.

The authority to fashion a remedy adequate to this occasion no longer lies with the legislative or executive branches. That authority now resides solely in this Supreme Court. It is therefore to this Court that the petitioner respectfully addresses her final prayer for relief.

III. The Final Order Violates the Natural Rights of Posterity To Enjoy the Blessings of Liberty for which the Constitution of the United States Was Established.

A decision of those now living to injure future generations, willfully and for our own gain, compels us to ask sweeping questions about what rights these unborn ones may have. If it is wrong to kill or intentionally injure a human being now living, is it not also wrong to intend the death of a multitude of future people, or to force them to suffer lives of illness or deformity?

As the President of the United States said on August 3, 1982:

> "I strongly believe that the protection of innocent life is, and has always been, a legitimate and indeed the first duty of government."

Yet there is a problem of recognizing the rights of future persons who have no distinct "particularity" under the law, or are not yet "persons" within the meaning of the Bill of Rights. It was perhaps best expressed by Jonathan Schell in *The Fate of the Earth*:

> "And if we find the subject strangely

> 'impersonal' it may be in part because the unborn, who are the ones directly imperilled by extinction, are not yet persons. What are they then? They lack the individuality that we often associate with the sacredness of life, and may at first thought seem to have only a shadowy, mass existence. Where are they? Are they to be pictured lined up in a sort of fore-life, waiting to get into life? Or should we regard them as nothing more than a pinch of chemicals in our reproductive organs, toward which we need feel no special obligations? What standing should they have among us? How much should their needs count in competition with ours? How far should the living go in trying to secure their advantage, their happiness, their existence?"[28]

By discounting the lives of these innocents, the respondents are embarked upon governmental territory uncharted by the framers of the Constitution. Through its role in developing and promoting nuclear power, the federal government has, for the first time, begun to determine what level of fatal and genetic injury it may "acceptably" cause the general public—and future generations. As the numbers have consistently grown over recent years, now running into the millions—or even billions[29]—of delayed deaths over the long term, the government's philosophical—and constitutional—dilemma has deepened. Moreover, even if future generations were not involved, this dilemma would persist, because nearly half of the deaths will occur to persons other than Americans, yet all of the electricity will be consumed by the American economy.

It is unlikely that this consequence was foreseen when the Atomic Energy Act was passed in 1946,

revised in 1954, or amended in 1974.[30] However, as early as 1976, when the NRC published its final "GESMO" study,[31] the Commission began to acknowledge that planned deaths in the general population were a necessary evil of nuclear development.[32] By planning deaths, the Commission implicitly sanctioned non-accidental, willful, intentional, premeditated extermination of predictable numbers (and to some extent, genetically predetermined classes) of citizens and foreign nationals by federal licensees who were, by the same stroke, rendered immune from prosecution.[33]

What has been placed at jeopardy by these sanctions is a concept of law as old as the Code of Hamurabi. Put very eloquently by the anonymous writer, Junius, in a letter to the printer of the London *Public Advertiser* on August 8, 1769, the idea is that:

> "We owe it to our ancestors to preserve entire those rights which they delivered to our care: we owe it to our posterity not to suffer their dearest inheritance to be destroyed."

This generation is in the process of destroying a precious inheritance for all succeeding generations: not only the genetic code from which all future humans must originate, but also the right of posterity to be free from human sacrifice to ancient or foreign governmental decisions which carry no benefits to them at all.

In both law and medicine, a doctrine of prudent behavior requires that when public health is placed in jeopardy, a higher standard of protection must be adopted until a lower standard may reasonably be

believed to provide equally adequate public safety. In 1978, the petitioner requested that NRC adopt a higher standard for protection of the general human environment from non-accidental releases from the entire nuclear fuel cycle, and suspend operation of the fuel cycle to prevent unnecessary loss of life until such time as this standard could be implemented. Her request was made pursuant to the provisions of the Atomic Energy Act which contemplate no *non-accidental* deaths among members of the general population in the normal course of operation of the nuclear fuel cycle,[34] and under the Constitution and international human rights obligations of the United States which expressly prohibit "normal" deaths to any predesignated portion of the general population as the intended result of any federal activity.[35]

The final order of the Commission did not dispute the fact that these millions of deaths are unnecessary in order to derive a reasonably priced, reliable supply of electricity, or that a higher standard for radiation protection is indeed feasible, albeit less economical. The Commission instead determined that the decision of the federal government to cause public deaths lies within the constitutional authority of the executive and legislative branches. While the petitioner concurred in the reasoning advanced by the Commission that all acts of government—and all human endeavors—carry the prospect of *accidental* injury to innocent persons, the petitioner steadfastly maintained that there is nothing in the Constitution that allows Congress, the Executive, or the Judiciary to sacrifice the lives of innocent children in order to produce electricity, or to

further the common welfare of the nation in any comparable way, especially when non-lethal, economically favored, but federally neglected alternatives abound for implementing the same federal purposes.

By declining to pass upon this question, the Court of Appeals has necessitated the intercession of this honorable Court.

IV. The Final Order Violates the Obligations of the United States under International Law.

The social philospher, Edmund Burke (1729-1797), described the binding links between generations as a perpetual partnership. He wrote:

> "Society is indeed a contract. . . . It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained except by many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."

Speaking of the society into which each of us is born, Burke argued that it is always wrong to "hack that aged parent in pieces." Likewise, of the future children to be born to the partnership, Burke argued that:

> "the temporary possessors and life rentors. . . should not think it among their rights to cut off the entail, or commit waste on the inheritance. . . [lest they] leave to those who come after them a ruin instead of a habitation."

Burke regarded the liberties of the people as:

> "an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity; as an estate specially belonging to the people of this kingdom, without any reference whatever to any more general or prior right."[36]

It is the liberty which belongs to future generations which is sacrificed by the federal order below. The government destruction of a large group of citizens, selected in substantial part on a genetic (racial) basis, constitutes the international crime of genocide. Genocide—the attempted destruction of a certain type of people—impairs the interior diversity of our species. It is an attack not merely upon existing people, but upon the biological heritage that human beings transmit from one generation to the next. It is a crime against the future.

Yet as this Court wrote in *Calder v. Bull*, 3 U.S. 386 (1798):

> "There are acts which the federal or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it law), contrary to the first great principles of the social compact, cannot be considered a rightful exercise of the legislative authority. . . .
>
> * * *
>
> "The legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in

> future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime. . . . To maintain that our Federal, or State, legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."[37]

It was after the holocaust of World War II that the governments of the world convened in New York in an attempt to devise some standard by which the conduct of nations toward innocent populations could be internationally regulated. What emerged was the Universal Declaration of Human Rights, unanimously adopted in 1948 by the United Nations General Assembly.[38] While some human rights conventions have yet to be ratified by the U.S. Senate, the United States is bound to all the U.N. human rights treaties, both by subscription to the United Nations Charter, which is itself a multilateral treaty, and by adoption (and frequent invocation) of the Helsinki Agreement.[39]

One of the first codifications of human rights adopted by the U.N. General Assembly was the Convention on the Prevention and Punishment of the Crime of Genocide, ratified by approximately 80 nations. The Convention was adopted to prevent a recurrence of the brutal policies of Nazi Germany; ". . . crimes so great that they overwhelm[ed] the capacity of every existing system of jurisprudence, or other organized human response, to deal with them adequately."[40] The Genocide Convention affirmed that genocide is a crime under international law which is punishable whether the principals and accomplices are private or public and

whether the crime is committed on religious, racial, political *or any other ground.* [41]

The Genocide Convention was closely tied to the Nuremberg Principles, which were general maxims of international law derived during prosecution of war criminals after World War II. The Principles were endorsed at the First Session of the U.N. General Assembly in 1946. The Principles define murder, extermination, involuntary experimentation, enslavement, and other inhuman acts against *any* civilian population as "crimes against humanity."

Whenever crimes against humanity or acts of genocide are committed, a special obligation is assumed by the offending government to the international community. Nations which are party to the Helsinki Agreement may not take any legislative, judicial or other measures which may prejudice these obligations. Whenever such crimes are committed, they *must* be halted, prosecuted, and prevented from recurrence. Any persons in government who tolerate the commission of such crimes are themselves guilty of a crime against humanity. The fact that internal law does not impose a penalty for an act which constitutes an international crime, or the fact that the person committing the act serves as a responsible government authority or acts under orders of a superior or by legislative enactment, does not relieve the actor of responsibility under international law, provided a moral choice is possible.[42]

In the present case, a moral choice is not only possible, but sweetly alluring. One of many examples which the petitioner gave to the Commission was the actual

experience of the City of Los Angeles in reducing commercial display lighting following the oil embargo of 1973.[43] On that occasion, a modest, and largely voluntary reduction of advertising and decorative electric displays resulted in an 18 percent reduction of the city's entire electric load, with no corresponding losses in business revenues. This is only one small example of the enormous potential for increasing our national energy efficiencies and diminishing unnecessary human suffering.

It is simply untrue that all policy choices for generating or conserving electricity "can almost certainly be linked to a few deaths," obviating the moral question.[44] The sadder truth is that the Commission has elsewhere proposed that "the death which may be caused by the fuel cycle may not be considered in a federal decision on whether or not to license a plant," and that "if a viable alternative, which was not expected to kill, were otherwise equal on a cost-benefit basis with a reactor, the Commission would ignore the alternative's lack of human casualties."[45]

The Commission states in the final order below that:

> "This Commission does not sit as an arbiter of any national morality alleged to exist. . . Nor does any Commission. Nor does any Court.
>
> * * *
>
> "For the reasons we have discussed, some deaths from activities with the scope and value of nuclear power are 'acceptable,' at least in the sense that the Congress, the Executive and the Judiciary know about them and accept them."[47]

The eminent English jurist, William Blackstone (1723-1780), observed that there are "fundamental principles of law; which, though legislators may depart

from, yet judges are bound to observe."[48] Blackstone viewed our natural liberty as protected merely by a matter of judgment; by the maintenance within free governments of judicial bodies, capable, by tradition, position, and training, of judging well. The fundamental principles to which judges must adhere are drawn from custom and morality—it is moral judgment which gives the law its weight and authority. Blackstone referred to this moral quality as the *"lex non scripta"*; the unwritten law.

Never before has humanity witnessed a period of evolution that can compare to the last four decades. We have discovered fundamental relationships between energy and matter, and in so doing, have entered an era that holds both the promise of prosperity and the peril of our own annihilation. To cleave to the promise while avoiding the peril we will have to apply every bit of wisdom we have discovered in our long journey through the ages. If we elect, at this hour, to regard innocent lives as less important than inanimate wealth, we will take a disastrous turn toward extinction—and what value will our material wealth then have, without anyone to possess it? If we elect instead to affirm our faith in those principles which, in the past, have served us so well, those so intrinsically human commandments as, "Thou shalt not kill," and "Do unto others as you would have them do unto you," we advance our prospects for survival, and with them, our natural rights, our liberty, and our inestimable value to the whole of creation.

These decisions which must now be made, not just for a solitary litigant, but for endless Posterity, must be made on moral principle. While the words chosen by the founders of our Republic are clear, and while the formulations of the United Nations counsel wisely, the final judgment in this case must derive from the *lex non scripta* that dwells within the human soul. A moral choice is possible. This is a question of conscience.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the District of Columbia Circuit.

Respectfully submitted,

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On the Petition,

Joel Kachinsky,

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The Natural Rights Center
Summertown, Tennessee
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